

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 395 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

HAMIR DEVA

Appearance:

MR KC SHAH, APP, for Appellant.

MS PANCHAL FOR MR ND NANAVATI for Respondent No. 1

MR PN BAVISHI for Respondent No. 2, 4, 5

MR KB ANANDJIWALA for Respondent No. 3

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 18/09/98

ORAL JUDGEMENT

1. This appeal arises out of a judgment and order passed by Chief Judicial Magistrate, Junagadh, in Criminal Case No.7136 of 1990 on 5th December, 1990. The present respondents were original accused in that case and were charged to have committed offence punishable under Sections 224 and 225 of Indian Penal Code.

2. The facts leading to the case can be narrated, in brief, as under :-

2.1 Accused No.1-Hamir Deva was admitted to Civil Hospital, Junagadh, as a prisoner in the Prisoners' Ward on 7th March, 1990. While accused No.1 was in custody, accused Nos.2 to 5 were on duty as Guards at the Prisoners' Ward. It is alleged that, on that day, accused No.2 helped accused No.1 in illegally escaping from the custody around 20.00 to 20.30 hours and he did not come back till 16.30 hours on the next day. Accused Nos.2, 4 and 5 were, therefore, party to this, as they consented at the departure of accused No.1 with the help of accused No.2. This offence was registered when Police Guard-Meram Bhikhabhai Barot of Junagadh City Police lodged a First Information Report with Junagadh City Police Station vide C.R.-I No.118 of 1990. The police investigated the offence and having found sufficient evidence, charge sheeted the accused persons. The accused persons pleaded not guilty to the charge and expressed their desire to face the trial. The learned Chief Judicial Magistrate, after considering the evidence on record, recorded the judgment and order of acquittal, which is impugned in this appeal.

3. Mr. K.C. Shah, learned Additional Public Prosecutor, appearing for the appellant-State has assailed the judgment and has urged that gross error is committed by the learned Chief Judicial Magistrate in acquitting the accused. He submitted that, public servants have joined hands with criminals in escaping from the custody which ought to have been seriously viewed by the learned Magistrate and trifling lacunas ought to have been ignored by the learned Magistrate. He, therefore, urged that the appeal may be allowed.

4. Ms. Panchal appearing on behalf of Mr. N.D. Nanavati for accused No.1 opposed this appeal.

5. This Court is taken through the record and proceedings. It transpires that, according to the prosecution, Police Constable Mithusinh Ramsinh and Kacharusinh Rachusinh visited the Prisoners' Ward to find that accused No.1-Hamir Deva was not in the Ward. They, therefore, made inquiries and, ultimately, learnt that accused No.1 and accused No.2 had gone out in the city. Complainant Meram Bhikha, therefore, lodged the information as required under law which provides that "whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been

convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both". It is, therefore, necessary for the prosecution to establish that accused No.1 was undergoing a sentence and was in custody as a convict. Now, if we see the evidence, the prosecution has grossly failed to bring on record any material to show that accused No.1 was in custody, that he was convicted for any offence and that he escaped from the custody. If that is so, the prosecution cannot be said to have proved the case against the accused persons.

6. The defence has challenged the visit of the Constable Kachrusinh Chauhan. This witness says that he had made an endorsement in the register that is maintained at the Prisoners' Ward at the Civil Hospital when he paid the visit to the said Ward, but the prosecution has not produced the register or a copy thereof to indicate that, in fact, Constable-Kachrusinh Chauhan did visit the said Prisoners' Ward. Evidence of Kachrusinh Chauhan, Ex.23, if perused, indicates that Kachrusinh has stated in reply to the question by Court that it was not revealed from interrogation that accused Nos.4 and 5 were responsible for the escape of accused No.1 or that accused No.1 had escaped from the custody. Likewise, deposition of Mithusing Ramsing, Ex.33, indicates that, if the prisoners are in the ward, the ward is kept locked and then he says that when he went for a check up, he made inquiries with the Head Constable and went away immediately, meaning thereby that he had himself not checked the ward to ascertain the presence or absence of the prisoners taking treatment over there.

7. Under these circumstances, it cannot be said that the prosecution could establish that accused No.1 was the prisoner taking treatment at the relevant time in the prisoners' ward, at the Civil Hospital, Junagadh nor can it be said that accused No.2 helped accused No.1 in escaping from the custody and accused Nos.3, 4 and 5 have failed in their duty in resisting such escape. It becomes a matter of doubt as to whether the witnesses really visited the place as the register is not coming on record. The deposition also indicates that, after interrogation of the Guards, Mithusing had gone away and what was inside the ward, naturally, could not have been seen by him, as generally the prisoners' wards are kept locked, if the prisoners are taking treatment. It is also a suspicious circumstance that, Kachrusinh and Mithusing, instead of lodging F.I.R. themselves, get it

lodged by accused No.5-Meram Bhikha.

8. In the result, the judgment and order passed by the learned Chief Judicial Magistrate recording acquittal of the accused persons cannot be said to be erroneous, illegal or unsustainable. This Court, therefore, refuses to interfere with the verdict of the learned Chief Judicial Magistrate and the appeal is, therefore, dismissed.

[A.L. DAVE, J.]

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